Supreme Court, U.S.
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NO. 85-1947

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

WILLIAM I. KAUFMAN
Petitioner,

v.

McCRORY STORES DIVISION, McCRORY CORP. (N.Y.); sub. of RAPID AMERICAN CORP. (Del.); HELENA L. BOWES, Individual; GEIGER & LORIA REPORTING SERVICE, INC. (Penna.),
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS THIRD CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS HELENA L. BOWES AND GEIGER & LORIA REPORTING SERVICE

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Service, Inc.

COUNTERSTATEMENT OF QUESTION PRESENTED

Did a privately employed stenographer, who was commissioned as a notary public under a state statute, act "under color of any statute . . . of any state" within the meaning of 42 U.S.C. §1983 by recording and transcribing depositions of witnesses as part of the discovery process in a state court civil action?

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The Respondents Helena L. Bowes and Geiger & Loria Reporting Services, Inc., (hereinafter "Geiger & Loria") respectfully request that this Court deny the Petition for a Writ of Certiorari, seeking review of the Judgment Order of the Third Circuit in this case. The Judgment Order is found as Exhibit C-1 in the Petition.

COUNTERSTATEMENT OF THE CASE

Petitioner's claim arose out of a previous suit filed by the petitioner in the Court of Common Pleas of Allegheny County, Pennsylvania, against Penn Needle Art Co. During that law suit, petitioner, through counsel, took depositions of William Agnew and Michael Boukis on June 28, 1983, at the law offices of Naugle and Sullivan in Harrisburg, Pennsylvania. At the request of the petitioner, Geiger & Loria, a private company, sent an employee, respondent, Helena L. Bowes, to act as stenographer.

Petitioner's suit alleged that Agnew and Boukis falsely testified and that respondent Bowes, to the detriment of petitioner, omitted and changed portions of the testimony in her transcript of their depositions. Petitioner argued (a) that the respondent Bowes' status as a notary public under the Pennsylvania Notary Public Act of 1953 (57 Pa. Stat. Ann.

§147, et seq.) rendered her stenographic services in taking the depositions action under color of state law within the meaning of 42 U.S.C. §1983, (b) that since the owner of respondent Geiger & Loria, Virginia Loria, is a notary public and former federal court employee, respondent Geiger & Loria also acted under color of state law in the premises, and (c) that all of the respondents acted together, under color of Pennsylvania statutes governing notaries public, to violate petitioner's consitutional rights protected by the Fifth and Fourteenth Amendments to the Constitution of the United States. He hence brought this action under 42 U.S.C. §1983.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Petition Presents No Basis For A §1983 Action.

This is simply a case of defective pleading. Petitioner has no cause of action

against respondents Bowes and Geiger & Loria under 42 U.S.C. §1983 because neither respondent acted under color of state law within the meaning of §1983. The District Court's Memorandum Order and Judgment, affirmed without opinion by the Court of Appeals, correctly applies the understanding of §1983 unvaryingly expressed by the Supreme Court in its prior decisions.

Petitioner's claim that respondent Geiger & Loria was a state actor within the meaning of §1983 is specious. As the District Court found, Virginia Loria, the owner of the respondent company, had no personal involvement in the conduct forming the basis of petitioner's claim. Thus, it was irrelevant that she was a Notary Public or was a former court reporter herself. Further, her past employment by the federal government could not be held to constitute state action. The complaint, written in vague language, in fact makes no allegations of wrongdoing against

respondent Geiger & Loria. Geiger & Loria is only mentioned as the employer of Helena L. Bowes. Therefore, only the doctrine of respondeat superior could be used to impose liability herein upon Geiger & Loria. Under the reasoning of Monell v. New York City Department of Social Services, 436 U.S. 658, 691-692 (1978), even if Geiger & Loria were deemed a state actor, liability could not be imposed under §1983 solely because it employed a tort feasor.

Nor did respondent Helena L. Bowes act under color of state law. The District Court was correct in analogizing a notary public to an attorney in a private case. In Polk County v. Dodson, 454 U.S. 312 (1981) the Supreme Court held that a public defender who was a full-time employee of the county was not acting under color of state law and not amenable to suit under §1983 when she withdrew as counsel from a criminal defendant's appeal of a state court conviction. The Court found

that her assignment entailed functions and obligations that were in no way dependent upon state authority. Once the public defender was appointed she became the defendant's attorney and the defendant became her client. The District Court correctly found Polk County to be dispositive of the petitioner's present action.

> The Complaint clearly reveals that Bowes was hired in her capacity as a privately employed stenographer to record the testimony of the two deponents. Stenographers are not licensed by Pennsylvania and anyone may engage in the occupation who feels he or she has the necessary competence. Thus, just as in Polk County there is no action under color of state law here because Bowes' 'assignment entailed functions and obligations in no way dependent upon state authority.'

Kaufman v. McCrory Stores Division of McCrory Corp., 613 F. Supp. 1179, 1182 (M.D. Pa. 1985). The courts below correctly concluded that no issue of state action in the present case arose because Helena Bowes, a privately employed stenographer, had obtained her commission as notary public as a convenience to

litigants. Petitioner's claim arises simply out of Bowes' function as a stenographer and not out of any actions performed in her capacity as a notary public. Clearly, an independent stenographer at a civil deposition is not engaged in a traditionally state function, but a duty well within the private domain.

CONCLUSION

For all of the foregoing reasons, it is respectfully urged that the petition for a writ for certiorari be denied.

Respectfully submitted,

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